OCT 8 1900
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SUPREME COURT

OF THE UNITED STATES.

for D. E. Cree

Filed Oct. 8, 1900.

OCTOBER TERM, 1900.

NO. 20.

FRED STEARNS, AS COUNTY AUDITOR OF AITKIN COUNTY, MINNESOTA,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, ON RELATION OF JAMES N. MARR,

Defendant in Error.

BRIEF ON RE-ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

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McGill-Warner Co., Printers, St. Paul, Minn.

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FRED STEARNS,
as County Auditor
of Aitkin County, Minnesota,
Plaintiff in Error,
VERSUS
STATE OF MINNESOTA,
on Relation of James N. Marr,
Defendant in Error.

BRIEF ON RE-ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

The constitution of the State of Minnesota has always contained the following provisions:

> "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash

valuation and be equalized and uniform throughout the state." Art. 9, sec. 1.

"Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property, according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation." Art. 9, sec. 3.

In 1871 the constitution of Minnesota was amended, by the addition of a section, known as section 32 (a), to article 4 thereof, which is as follows:

"Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of said railroad companies now existing or hereafter organized, shall, before the same shall take effect or be in force, be submitted to a vote

of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

Prior to 1871 the State of Minnesota had made grants of public lands to several railroad companies, among which are the grants in question, now claimed to be enjoyed by the following companies:

1. The St. Paul & Duluth Railroad Company.
2. The Northern Pacific Railroad Company.
3. The Minneapolis & St. Cloud Railroad Company.

The grant under which the St. Paul & Duluth Co. now claims, so far as material, is as follows:

"Provided that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year, pay into the treasury of the state one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after thirty miles of said railroad shall be completed and in operation; and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this state, on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad; and shall, from and after the expiration of said seven years, on or before the first day of March of each and every year, *pay into*

the treasury of this state three per cent on the gross earnings of said railroad; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatsoever."

(S. L. 1865, Chap. 8, Sec. 1.)

The grant under which the Northern Pacific Co. now claims, so far as material, is as follows:

"That the lands, franchises, property, stock and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property and franchises of the Lake Superior & Mississippi Railroad Company, as is provided in and by an act entitled 'An act in relation to the taxation of lands granted to the Lake Superior & Mississippi Railroad Company,' approved March 3, 1865; provided, however, that the gross earnings of said railroad company of which a percentage is to be paid to the state, shall include only the earnings of that portion of the Northern Pacific Railroad Company constructed and operated by said company within the limits of this state."

(S. L. 1870, Chap. 65, sec. 1).

The grant to the Lake Superior & Mississippi Railroad Co., referred to in the grant to the Northern Pacific Co., is the one under which the St. Paul & Duluth Co. now claims, the last named company being the successor to the Lake Superior & Mississippi Railroad Co.

The act under which the Great Northern Ry. Co. now claims, as successor to the Minneapolis & St. Cloud Railroad Co., is as follows:

"Section 1. That in consideration of an annual payment of a per centum upon the gross earnings of the Minneapolis and St. Cloud Railroad as herein provided, the road, its appurtenances and appendages, and all other property, estate and effects of the Minneapolis & St. Cloud Railroad Company, which they have already acquired or which they may hereafter acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all assessments and taxation; and in consideration of the grants made to and privileges and franchises conferred upon said company, and of the exemption contained in this section, the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March of each and every year, pay into the treasury of the state one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after the said railroad shall be completed and in operation, and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad; and shall, from and after the expiration of ten years from the

completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad. And the payment of such per centum annually as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this state on or before the first day of February in each year, the truth of which abstracts shall be verified by affidavits of the secretary and treasurer of said company; and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstract, full power is hereby vested in the Governor of this state or any other person appointed by law to examine under oath the officers and employes of said company or other persons; and if any person so examined by the Governor or other authorized person, shall knowingly or willingly swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of the aforesaid per centum, it is hereby declared that the state shall have a lien upon the railroad of said company and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company.

"Sec. 2. The provisions of the foregoing section are hereby extended to the said Minne-

apolis & St. Cloud Railroad and all its branches."

(S. L. 1870, Chap. 52).

Pursuant to the constitutional amendment of 1871, hereinbefore quoted, the legislature of said state submitted to the voters thereof, at a general election held therein in the month of November, 1896, for their approval or rejection, a statute enacted in 1895, providing for the taxation by the ordinary method of all lands granted to railroad companies. The statute so submitted was adopted, the first three sections of which are as follows:

"Section 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States, or the territory of Minnesota, to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used or occupied for rights-of-way, gravel pits, sidetracks, depots, and all buildings and structures which are necessarily used in the actual management and operation of the railroad of said companies; provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as is now provided by law, and that nothing in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands.

"Sec. 2. Such portion or portions of any act or acts, general or special, of the State or Territory of Minnesota, heretofore enacted, which

provides or attempts to provide for any exemption of the lands hereby declared taxable from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

"Sec. 3. If this act shall be held to be void, so far as it applies to the lands of any particular railroad company in this state, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated."

(G. L. 1897, page x).

Pursuant to the passage and popular approval of said act of 1895, the county auditor of the County of Aitkin, in said state, was proceeded against by the relator, James N. Marr, a citizen of that county, who sought to compel him by writ of mandamus to place upon the tax lists of his county, for the purpose of taxation, the several tracts of land the tax whereon is now in controversy.

The Supreme Court of Minnesota decided that the said tracts are taxable by reason of the passage and approval of said statute of 1895.

I.

The doctrine that a state can contract away so essential an attribute of sovereignity as the power of taxation, should be receded from.

We have already, in the brief originally filed on

behalf of the defendant in error, contended for the overthrow of the doctrine that a legislative body can barter away any of the indispensable sovereign powers of a state. It is not our purpose to now enlarge to any considerable extent upon what we have said in our former brief.

With great respect for the opinions of this Court, we deem it our duty to protest against the doctrine which concedes to a legislative body the constitutional right of depriving a state of the power of taxation. We do this with all the more freedom because of the numerous powerful dissenting opinions which have emanated from the members of this Court. The whole doctrine rests upon the unfortunate *obiter dictum* of Chief Justice Marshall in *State of New Jersey vs. Wilson*, 7 Cranch 164. As was long ago pointed out by Mr. Justice Catron, in *State Bank vs. Knoop*, 16 How. 369, in the dissenting opinion filed by him:

> "No question was raised in the Supreme Court of New Jersey, nor decided there or in this court, as to the constitutional question of one legislature having authority to deprive a succeeding one of sovereign power. The question was not considered, nor does it seem to have been thought of in the State Court, or here."

No such question was before the Court in *Gordon's case*, 3 How, 144; see analysis of Mr. Justice Cution in *Piqua Bank Case*, 16 How. at page 400; and in *East Hartford v. East Hartford Bridge Co.*, 10 How. 535, the doctrine was denied in the following language:

> "This case of *Goszler v. the Corporation of Georgetown,* (6 Wheat, 596, 598,) appears to settle the principle that a legislative body cannot part with its powers by any proceeding so as not to be able to continue the exercise of them. It can and should exercise them again and again, as often as the public interests require. * * * Its members are made by the people agents or trustees for them on this subject, and can possess no authority to sell or grant their powers nor the trust to others."

It was said further in the case last cited:

> "The public character of all the parties to this grant, no less than its subject matter, seems, therefore, to show, that nothing in the nature of a contract with terms to be fulfilled or impaired like private stipulations, existed in this case so as to prevent subsequent interference with the matter by the legislature, as the public interests should appear to require."

We regard the doctrine as so obviously unsound, and in its tendency so destructive of government, that neither lapse of time nor repeated judicial recognition of it would ever justify it. We believe that the weight of the argument in all the adjudications of this Court upon the subject has been with the dissenting justices. It was said by this Court in *Bailey v. McGuire,* 22 Wall. 217, that:

> "It were better for the interests of the community that this power(of taxation) should on no occasion be surrendered."

So late as 1873, and in the case of *Minot v. Phil. W. & B. Railroad Co.*, 18 Wall. 206, Mr. Justice Field took occasion to remark:

> "The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this Court has said, the whole communnity is interested in retaining it undiminished, and has 'a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' *Bk. v. Billings*, 4 Pet. 561. If the point were not already adjudged, it would admit of grave consideration whether the legislature of a state can surrender this power and make its action in this respect binding upon its successors, any more than it can surrender its police power or its right to eminent domain."

In *Washington University vs. Rouse*, 8 Wall. 439, Mr. Justice Miller dissenting, being joined in his dissent by Chief Justice Chase and Mr. Justice Field, said:

> "To hold, then, that any one of its annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful. * * If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hinderance can

> be seen in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all burdens of supporting the government. * * * With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies which can never be finally closed by the decisions of the Court, and that the one we have considered is of this character. We are strengthened in this view of the subject by the fact that a series of dissents from this doctrine by some of our predecessors, shows that it has never received the full assent of this Court; and referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protests against a doctrine which we think must be finally abandoned."

We respectfully submit that the logic of Mr. Justice Miller is unanswerable.

In the recent case of *Ford vs. Delta and Pine Land Co.*, 164 U. S. 666, this court, by Mr. Justice Brewer, took occasion to remark:

> "Indeed, there has been strong judicial dissent from the doctrine of the power of the state legislature to create a permanent exemption from taxation." Citing:
>
> *Washington University vs. Rouse, supra.*

That the state courts quite universally, before the determination of the case of *State of New Jersey vs. Wilson, supra,* had held that the state is without the power, in the absence of constitutional limitations, to contract away the right of taxation, and have since, in many jurisdictions, protested against the doctrine of the Federal cases, is illustrated in the following decisions:

Mott vs. Penn. R. R. Co., 30 Pa. 9.
Merchants & Traders Bank vs. Debolt, 1 Oh. St. 591.
Toledo Bank vs. Bond, Id. 622.
Knoop vs. Piqua Bank, Id. 603.
Brewster vs. Hough, 10 N. H. 138.
Brainerd vs. Colchester, 31 Conn. 407.
E. Saginaw Salt Mfg. Co. vs. E. Saginaw, 19 Mich. 259.
Raleigh, etc., R. R. Co. vs. Reid, 64 N. C. 155.
W. Wisconsin R. R. Co. v. Bd. Supervisors, 35 Wis. 257.

Can there be any doubt that the doctrine is fraught with a danger to the public so great that private interests should not be allowed to weigh against it?

Entertaining these views, we respectfully request a reconsideration of the question by the Court.

II.

While this Court may revise the judgment of the Supreme Court of a state, in-

volving a statute of that state claimed to impair the obligation of a contract, the decision of the state Court will be followed when the question is doubtful, or the decision is not clearly wrong.

This court has always sought to conform its decisions to those of the state Court. It always does so where rights have arisen subsequent to the judicial construction of a state constitution or statute by the state Court. It will follow them, when the question is balanced with doubt.

The question is clearly stated by Mr. Justice Bradley, in *Burgess vs. Seligman,* 107 U. S. 20:

> "The Federal Courts have an independent jurisdiction in the administration of the state laws, co-ordinate with and not subordinate to that of the state Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of the state constitutions and statutes. Such established rules are always regarded by the Federal

Courts, no less than by the state Courts themselves, as authoritative declarations of what the law is. But where the law has not thus been settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state Courts after such rights have accrued. *But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt.*"

The decision of the state Court will not be overruled unless it is clearly wrong.

"The decision (of the state Court) ought not to be overruled unless it is clearly wrong. The delicate power which we have under the constitution of the United States over the judgments of the state Courts, ought always to be used with the greatest caution. There should be no reversal of such subjects unless the error is manifest."

Memphis & C. R. R. Co., vs. Gaines, 97 U. S. 697.

This Court will follow the state Court when confusion and uncertainty would result from a conflicting construction.

Flash vs. Conn., 109 U. S. 371.

III.

The taxing power of the state is never presumed to be relinquished, and it exists unless the intention to relinquish it is declared in clear and unambiguous terms admitting of no other reasonable construction.

Numerous decisions of this Court support the above doctrine. It was said in *North Mo. R. Co. vs. Maguire*, 20 Wall. 46:

> "Repeated decisions of this Court have held in respect to such corporations, that the taxing power of the state is never presumed to be relinquished, and consequently it exists unless the intention to relinquish it is declared in clear and unambiguous terms."
>
> "The contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. When it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows the trust created for the good of all."

West Wis. R. Co. vs. Supervisors, 93 U. S. 595.

In the application of the foregoing rule it is not merely a question of the phraseology of the alleged contract, but, as in the case at bar, a question of constitutional authority to make the contract. Whatever may be said as to the aptness of the language used in the several statutes now relied upon by the plaintiff in error, it is the contention of the defendant in error that under the constitution of Minnesota the legislature was wholly without authority to contract. In order, therefore, that a contract may be adjudged to exist, it must be made to clearly appear:

1. That the legislature had the power to make the contract.
2. That the legislature intended to make it.

Doubt as to either proposition is fatal to the contention of the plaintiff in error. Whenever it is contended that a state has stripped itself of the power of taxation as to a given subject, the rule is always imperative, as this Court has frequently held, that it must be clearly shown. It was because of the harshness of the doctrine that a state Court can in no case contract away a sovereign power, that this Court has invoked the rule that all public grants are to be strictly construed. For as was said in *Minot vs. Phil. W. & B. R. R. Co.,* 18 Wall. 206:

> "Nothing can be taken against the state by presumption or inference. The established rule of construction in such cases is that rights, privileges and immunities not expressly granted are reserved. There is no safety to the pub-

lic interests in any other rule. *And with special force does the principle upon which the rule rests apply, when the right, privilege or immunity claimed calls for any abridgment of the powers of the government, or any restraint upon their exercise.* The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this Court has said, the whole community is interested in retaining it undiminished, and has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

Where no other question is presented than the construction of a statute, and the terms employed are clear and apt, admitting of no doubt as to their meaning, no occasion arises for the application of the rule. Such is the case of *McHenry vs. Alford*, 168 U. S. 651, cited by counsel for plaintiff in error.

The doctrine of strict construction has been applied to cases analogous to the one at bar.

IV.

The Legislature of Minnesota was without power to enter into a contract exempting railroad companies from taxation, or relieve them from their just share of the burden of taxation, whether as to granted lands, or otherwise.

It is doubtful if there can be found in any other state constitutional provisions which are the exact equivalents of sections one and three of article nine

of the Minnesota constitution, hereinbefore quoted.

Authorities cited in the briefs of counsel for the plaintiff in error will be generally found inapplicable, because of the radical difference between the constitutional provisions involved in those cases and those found in the Minnesota constitution.

Reading together sections one and three of article nine, of the Minnesota constitution, as they manifestly should be, and as the Supreme Court of Minnesota in its decision in this case held they must be read, it is evident that the constitution requires:

1. That all property not expressly exempted from taxation, shall be taxed.

2. That the taxes shall be as nearly equal as may be.

3. That the property taxed shall have a cash valuation.

4. That real property shall be taxed according to its true value in money.

5. That the lands or other property of railroad companies are not and cannot be exempt, save where exemption is based upon a contract antedating the organization of the state government.

Plaintiff in error, notwithstanding the contention of his counsel to the contrary, claims an exemption in fact. Counsel certainly claim a contract whereby the constitutional rule of the State of Minnesota cannot be applied to the taxation of the lands in question; whereby, in consideration of the payment of a percentage upon gross earnings, those lands are to escape taxation. Whether the method be termed taxation or the commutation of taxes, the fact re-

mains that the rate is fixed and unchangeable. The sums annually paid into the state's treasury may be wholly disproportionate to what would be paid by a just method of taxation, yet the state, according to the contention of the plaintiff in error, is powerless to correct the wrong. The fallacy of such contention is the more forcibly seen when the argument is carried to its ultimate analysis. If the legislature had the power to make the contracts in question, it had the power as well to fix the rate at one per cent or one tenth of one per cent, or to forego all taxation and all commutation of taxes. The argument concedes to the legislature the power to contract. If the legislature had the power contended for, it might with equal authority, have stipulated that the lands or other properties of the companies should be taxed at one-half or one-fourth of the value placed upon other property of a similar character. It is exemption, whether it is partial or total immunity. The constitution is offended against in the one case as clearly as in the other.

It is idle, therefore, for counsel to contend, as they do, that they are not claiming exemptions. Conceding, for the purpose of argument only, that a commuted form of taxation is at all permissible under the constitution of Minnesota, the legislature, untrammeled by a contract, could provide for the taxation of railroad property necessary for the carrying on of its business by such system, while its granted lands should be subjected to the ordinary methods of taxation. But the contention of the plaintiff in error is that the legislature in question

has so fettered itself as now to be unable to treat the two classes of property separately for the purpose of taxation. If such method of taxation is permissible, it is merely a question of legislative wisdom or policy as to what method it shall pursue in either case. The constitution contemplates that property shall at all times bear its just proportion of the burdens of taxation. Wherefore, it follows that the legislature was destitute of power to contract for any different rule of taxation.

But it is immaterial whether we regard the record as presenting a case of exemption in a technical sense, or not. It is sufficient to know that the plaintiff in error contends for a contract which deprives the legislature of further power to act. It is a limitation and an abridgment of the power of taxation, so that, within the meaning of the numerous decisions of this Court, the power of taxation has been surrendered, and the rule of strict construction therefore applies. No such question was presented or considered in *McHenry v. Alford, supra,* for the reason that the element of contract did not exist. We contend that that case has no application whatever to the case at bar.

The Supreme Court of Minnesota held that the power to contract had not been conferred upon the legislature. The statutes were declared to be "in violation of Articles 9, Sections 1 and 3, of the Constitution," (Record, p. 68), and the Court further say:

> "If it be conceded that a commuted system of taxation, whereby a percentage on gross

earnings is accepted in lieu of taxation of railway property in specie, might be so adjusted as not to be obnoxious to the constitutional requirement of uniformity and equality of taxation, it is clear that an irrevocable contract, fixing for all future time the rate of taxation on such gross earnings, would not continue to be uniform and equal taxation, because the value of property changes from time to time, and the necessities of the state also change demanding an increased rate of taxation. This is especially true as to town, village, city and county taxes. But uniformity and equality of taxation are not the only mandates of the constitution, for it further commands, that all property on which taxes are to be levied, (that is, all property not exempt from taxation), shall have a cash valuation, and laws shall be passed taxing all real and personal property according to its true value in money.

"The language of the constitution is clear, exact and imperative. It requires that all property not exempt must be taxed, and that the basis of such taxation must be the cash value of the property. As was said by this Court in the case of *Com'r Rice Co. v. Citizens' Nat. Bank,* 23 Minn. 287:

"The leading and controlling purpose of these provisions was to subject all property, of every kind and nature, within the jurisdiction of the state, except such as is specially authorized to be exempted, to taxation upon a basis of a cash valuation, and to secure, so far as practicable, absolute equality and uniformity in the apportionment of taxes, so that every piece of property should bear its just

and proportionate share of the public burden in the exact ratio of its cash value to that of the entire taxable property of the state.'

"It may be true, as claimed, that the gross earnings tax, (if subject to amendment), is only another mode of arriving at equal taxation, and that such a system of commuted taxation of the property of railway companies and similar corporations, is of great practical and material advantage to the state. But the fact remains, that the taxation of all property upon the basis of its cash value was the sole rule ordained by the constitution to secure equality and uniformity of taxation. Thus in *Stinson v. Smith*, 8 Minn. 366, (which arose before the amendement to the constitution, as to assessments for local improvements), it was held that the statute providing for the assessment of the cost of such improvement upon real estate, in proportion to benefits, was unconstitutional, because all property on which taxes are to be levied must have a cash valuation. A commuted system of taxation of mining lands, property and products, by the payment of a tonnage tax on all ore mined and disposed of, in lieu of all other taxes, was held invalid by this Court, because in conflict with Article 9, Section 1, of the Constitution. *State v. Lakeside Land Co.*, 73 N. W. 970."

Plaintiff in error assails the decision of the Supreme Court of Minnesota as not being in accord with its previous decisions. The Court itself said, upon the subject of prior adjudications:

"There is no decision of this Court which holds that statutes of the state providing for

> the payment of a gross earnings tax by railway companies, and exempting their property from taxation in specie upon the basis of a cash valuation, were constitutional, prior to their ratification by the amendment of 1871, Article 9, Section 32(a). There is a clear intimation to the contrary in several cases, notable in those which follow the *Parcher Case,* 14 Minn. 297, sustaining the validity of territorial statutes providing for a gross earnings tax for the old land grant railway companies—that is, those which are organized under charters granted prior to the adoption of the constitution." (Record, p. 69.)

The Court was strictly correct in its statement of fact, as we shall now proceed to show.

The plaintiff in error cites among the earlier adjudications of that Court the following cases:

First Division Co. v. Parcher, 14 Minn. (Gil.) 224.

State v. Winona & St. Peter R. R. Co., 21 Minn. 472.

City of St. Paul v. St. P. & S. C. R. R. Co., 23 Minn. 469.

St. Paul & Chicago Ry. Co. v. McDonald, 34 Minn. 195.

County of Stevens v. St. Paul, M. & M. Ry. Co., 36 Minn. 467.

Com'rs Rice Co. v. Citizens' Nat. Bank, 23 Minn. 280.

We feel justified in saying that not one of the above named cases supports the contention of the plaintiff in error.

1. *The Parcher Case.*

The charter under which the railroad company claimed exemption was granted in 1857.

On April 15, 1858, the Constitution of Minnesota was so amended as to authorize four railroad companies, including the Minnesota and Pacific Railroad Co., to receive the bonds of the state in aid of the construction of their respective lines of railway.

The amendment provided that the company should issue and transfer to the State, as security for its aid, a certain amount of first mortgage bonds of the respective railroads, and their lines and franchises.

It was further provided that in case of default, the governor of the state might require a foreclosure to be made of the security bonds.

By the act of August 12, 1858, passed for the purpose of effectuating the constitutional amendment, it was provided that the purchasers at the foreclosure sale should acquire all and the same rights, privileges, franchises, immunities and advantages enjoyed by the mortgagor company.

By the act of March 6, 1860, being an act supplementary to that of 1858, it was made the duty of the governor to foreclose the mortgage of the Minnesota & Pacific Co. because of its default.

Sale was made, and the state purchased, and the state sold to parties who organized and became possessed of the property.

It was held that the state held and enjoyed, without merger or extinguishment, all of the fran-

chises so acquired by it, including that of taxation.

There is nothing in the case which suggests that under the constitution of 1858 the legislature was authorized to grant an exemption of taxation, nor was Article 9 of the Constitution referred to in the decision of the Court. Furthermore, in the case of *State v. Winona & St. Peter R. R. Co.*, 21 Minn. 315, being the first case arising after the decision in the Parcher case, relative to the state grant, the Court say, at page 317:

> "It is, however, contended by the attorney general that, in the case against Parcher, this Court was not called upon to consider, and did not pass upon the question raised by the constitutional requirement that 'laws shall be passed taxing * * * all real and personal property at its true value in money,' and further that this constitutional provision in effect prohibited and rendered void the transfer, by a law passed after the adoption of the constitution, of the immunity from taxation which was originally conferred upon the Transit Company, and which is now claimed by the Winona & St. Peter Company, as its successor. It is true that this constitutional provision does not appear to be considered in the opinion of this Court in the case referred to. But the consideration and disposition of the point made upon it, is involved in what is said, (on pages 328, 331, of the published opinion), to the effect that it is by *virtue of the amendement to the constitution* that this immunity from taxation, (whether it be regarded as a franchise, or as a right appendant

to the lands to which it related,) was permitted to be made the subject of the mortgage and forfeiture to the state, and was therefore transferrable to the purchaser at the mortgage sale, or to the state under a forfeiture, and also by what is further said in the opinion in reference to the right of the state to hold and transfer whatever it acquired as purchaser at the foreclosure sale, or by virtue of the forfeiture, as property, as a private person might hold and transfer the same, without merger or extinguishment of any of the franchises, rights or immunities possessed by the mortgagors, and which had become the subject of mortgage or forfeiture, under the provisions of the constitutional amendment. In other words, the constitutional amendment, popularly known as the Five Million Loan Amendment, is *controlling* in reference to its subject. It is not a mere act of the legislature, but a part of the organic and fundamental law, of equal authority, *per se*, with any other part of the constitution. Being a particular provision, with reference to a particular subject-matter, it is, within its own sphere, so far as that subject-matter is concerned, paramount and supreme. And it follows that its effect, in permitting the state, by the foreclosure or forfeiture, to acquire, hold and transfer the immunity from taxation, according to the doctrine of the Parcher case, is not controlled or overridden by the general constitutional provision in regard to taxation before quoted."

It thus appears that upon the first action arising subsequent to the decision in the Parcher case, the Court not only admits that Article 9 of the Consti-

tution was not involved, but also asserts that the decision in the Parcher case was rested wholly upon the amendment to the constitution. To say, therefore, that the Parcher case gives any support to the contention of the plaintiff in error, is to wholly misjudge the nature of the decision therein rendered.

2. *State v. Winona & St. Peter Railroad Co.*, 21 Minn. 472.

In this case the railroad company had acquired a grant of lands in 1857, accompanied with a stipulation that the lands should go untaxed until sold and conveyed.

In 1867 the company entered into a contract with one Barney, and others, for the sale and conveyance of the lands so granted. The contract was intended to be in the nature of a trust, with the title remaining in the railroad company. The Court held that the contract amounted to a sale and conveyance within the meaning of the grant, and that the lands became taxable. Counsel in their former brief, at page 16, quote from the decision rendered in the last named case, the following:

> "This is a contract between the state and the company, and whether it is provident or improvident, each must abide by it, according to its true intent."

The grant involved in that case antedated the constitution of 1858. Article 9 of the constitution was not drawn in question, nor in anywise involved

in the case. The question before the Court was purely whether there had been a sale and conveyance within the meaning of the granting act.

3. *City of St. Paul v. St. Paul & Sioux City R. R. Co.*, 23 Minn. 469.

The grant of this company was also acquired in 1857, and contained an exemption clause similar to the one in the Parcher case. It was, indeed, one of the four land grant railroad companies affected by the constitutional amendment of 1858.

The taxing officers of the city of St. Paul undertook to subject a certain lot of the company to an assessment for local taxation. It was conceded on the part of the city that the case was precisely like the Parcher case, with the single exception that in the latter the language exempted the company's property from "all assessments and taxes whatsoever," while in the former the language exempted from "all taxation." The distinction was held to be without merit. In the decision is found this language:

> "The line of railroad in question, together with the lands, property, immunities, and franchises pertaining thereto, is held under a grant made prior to the adoption of the constitution, and is hence unaffected by any of its provisions relating to the taxing power, and the mode in which it shall be exercised. This was fully settled by this Court in the analogous case of *First Div. St. Paul & Pacific R. Co. v. Parcher,* 14 Minn. 297. Upon the renewal of

> the grant, in 1864, to the present company, it was therefore clearly competent for the legislature to change and modify its terms and conditions, so as to require the annual payment of a different rate per cent of the gross earnings of the road, to commence upon the completion of thirty instead of fifty miles, and, in consideration of such annual payment, to exempt the railroad, its appurtenances and other property, from all taxation, and from all assessments, both general and local."

Now, immediately following the language quoted by the plaintiff in error, is the following:

> "This modification of the original contract was prohibited by no provision of the constitution."

In view of the quotations from the language of the decision, made by counsel for the plaintiff in error, touching the power of the state with reference to taxation of railroad companies, we call attention to the following language appearing at page 472, in the case last cited:

> "It is also a part of this well-known history that, in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act *among the four original land-grant companies,* in 1857, the then territory (now state) adopted a distinct and special policy of taxation *in reference to those companies and the lines of road which they were authorized to build,* looking to the early

completion of those lines, and the just rights and interests alike of the companies, the state at large, and all localities therein."

The Court thus clearly emphasizes the fact that the state, on grounds of public policy, had segregated the four railroad companies in question into a class, all of whom were favored by the amendment adopted in 1858, a few months after the adoption of the constitution; and that the only ground upon which the Court sustained modifications in the contracts entered into prior to 1858, was that by force of that amendment to the constitution, it was permissible. The conclusion is irresistible, and is supported by the reasoning of the Court in the last named case, that the *tax could not have been supported except for the provisions of the said constitutional amendment.*

The Court went on to say, in its decision, that the four companies had been treated as a class; that there was no intention to discriminate against either of them upon the subject of taxation, and that the words "all taxation" as used in the charter of the St. Paul & Sioux City Co. must be construed to embrace what was expressly stated as to the other companies, not only as to ordinary taxation, but also assessments for local improvements.

4. *St. Paul & Chicago Ry. Co. v. McDonald,* 34 Minn. 195.

This case was similar to that of *State v. Winona & St. Peter Rd. Co.,* already referred to.

The company entered into a contract with a construction company for the construction of a portion of its line, in consideration of which the construction company acquired three million dollars' worth of first mortgage land grant bonds of the railroad company; second, the whole issue of special preferred stock of the company, which secured to the holders an absolute separate ownership of all the lands which had been or should thereafter be granted to the railroad company; and all of the six million dollars' worth of the common stock. In short, the construction company was to get all the railroad company's property of a tangible nature.

The construction company went on and performed. The original contract was so modified that the construction company returned the preferred stock, and took a mortgage upon all the lands acquired by the railroad company by grant.

Subsequently the railroad company sold and transferred to the Milwaukee & St. Paul R. Co. its entire railroad, and thus became, as the Supreme Court of Minnesota said, "a mere legal shadow."

In view of the foregoing statement of facts, the Court say, including the italicised clause quoted by counsel at page 17 of his brief:

> "If the railway company had, in payment for building its road, sold, or contracted to sell, this land grant in a block by conveyance absolute in form, it would require no argument to show that these lands are taxable. In substance and effect, we think, the same thing has

been done. In short, the evidence compels us to the conclusion that this transaction, although in *form* a mortgage, is in *substance* a conveyance, and was intended to operate as such. *The state should and must, in letter and spirit, religiously keep its contract obligations; but the law will not tolerate the use of mere forms to evade its spirit.* To continue the exemption of these lands from taxation would be a fraud upon the state, and contrary to the meaning and spirit of the statute."

It is thus evident that there is no force whatever derived from the decision in that case useful here upon the subject of contracts. There had been a sale and conveyance for all intents and purposes, and the Court so held. It was merely a question as to the character of a particular transaction, and there was no occasion calling for a construction of the terms of the grant.

5. *County of Stevens v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 36 Minn. 467.

In this case, as in those to which we have referred, the grant providing for an exemption was made in 1857. This company, like the one involved in the Parcher case, lost its property and franchises, which passed to its successor. The Court applied the doctrine of the Parcher case to the effect that the rights, privileges and franchises, including that of taxation, passel to the successor, without merger or extinguishment. The lands were thereupon held not taxable until sold and conveyed. Article

9, Sections 1 and 3, of the constitution, were referred to as follows:

> "The point that sections 1 and 3 of Article 9 of the Constitution forbid this legislation was long ago settled in the *Parcher Case*, above cited, and in the case of *State v. Winona & St. Peter R. Co., supra,* and *City of St. Paul v. St. Paul & Sioux City R. Co., supra;* it being held that those sections of the Constitution did not prevent the legislature from modifying the terms of a provision for the payment of a percentage of gross earnings in lieu of other taxation, *in a case where that method of taxation had been established prior to the adoption of of the Constitution*, and, in the latter case cited, that by the constitutional amendment of 1871 (section 32, article 4), such legislation had been confirmed."

As to the question presented in the Stevens County case, the Court begins its decision with the following language:

> "There is presented here the question of the taxability of the estate or interest which the St. Paul, Minneapolis & Manitoba Railway Company has in its lands after the same have been contracted to be sold, but before the payment of the purchase price, or the performance of the contract conditions so as to entitle the purchaser to a conveyance."

It was expressly stipulated by counsel in the case, among other things, that the state had re-granted "the exemption from ordinary taxation of such granted lands till sold and conveyed by said com-

pany, in consideration of the annual payment of a percentage of its gross earnings," and that the St. Paul, Minneapolis & Manitoba Railway Co. had acquired "all the property, rights, franchises, immunities, exemptions and privileges, at any time possessed by said companies, or either of them, including the exemption from ordinary taxation, * * * pertaining to said line of railroad and said granted lands."

In view of such stipulation, the Court employed the following language, at page 473:

> "But it is contended that this exemption in favor of the First Division of the St. Paul & Pacific Railroad Company never passed to this respondent; that the mortgage through which its title was derived, was not in terms sufficient to include the right in question. *But by the admitted facts* to which we have referred, the contrary is established for the purposes of this case, and we forbear considering this question, upon which, as was intimated by the attorney general when the cause was presented, he should have desired to be heard on the part of the state if the question had been open for consideration."

Plainly, therefore, the decision in the above case does not support the contention of counsel. But, like one or more of the cases previously cited, it leaves the conviction upon the reader's mind that a legislature is without authority to contract away the right of taxation, under the provisions of the constitution of 1858.

There are other cases antedating the decision by the state court in the case at bar, which should be noted.

6. The case of *Com'rs of Rice County v. Citizens' National Bank,* 23 Minn. 280, involved proceedings to enforce the payment of delinquent taxes upon a banking house in one of the cities of Minnesota. The bank answered that it was a National bank, organized under an act of Congress. That the real estate in question consisted of land which was purchased, and the building thereon which was erected, with money forming part of its capital stock, for its immediate accommodation in the transaction of its business; that such land and building became and were a part of the defendant's capital stock, included in the 800 shares into which such capital stock was divided; that all said shares were assessed and taxed in 1874 to the holders thereof, at their full value in money, without deduction of the value of such real estate therefrom, and all the taxes as assessed on such shares were duly and fully paid; and that the taxes in question, which were assessed in 1874 were assessed on property which had already been duly assessed and taxed at its par value, for the same year, and the taxes on which had been fully paid. The Court say:

> "Is real property, lawfully owned and used as a place for the transaction of its business by a bank created and existing under the national banking law, taxable *eo nomine* against

the bank, under Laws 1874, c. 1, it being conceded that the specific provisions of that statute require the assessment and taxation of all the shares comprising the entire capital stock of the association in the name of the respective shareholders, and at their actual cash value, without any deduction on account of the real property so held by the bank, and in which a portion of its capital is invested? This is the sole question for consideration in this case, and its determination depends upon the character and effect of that statute."

After touching upon various features of the statute then in question, which are now quite immaterial, the Court remarked, bearing upon the objection that Sec. 3, Article 9, of the Constitution required the taxation in specie of all moneys, credits, investments, in bonds, stocks, joint stock companies, or otherwise and also all real and personal property, according to its true value in money:

"This section must be construed in connection with Sections 1 and 4 of the same Article, and also in view of the condition of things existing at the time of the adoption of the Constitution. Section 1 declares that 'all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state.' Section 4 provides that 'laws shall be passed for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description, of all banks and all bankers, so that

all property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals.' *The leading and controlling purpose of these provisions was to subject all property, of every kind and nature, within the jurisdiction of the state, except such as is specially to be exempted, to taxation upon a basis of a cash valuation, and to secure, so far as practicable, absolute equality and uniformity in the apportionment of taxes,* so that every piece of property should bear its just and proportionate share of the public burden in the exact ratio of its cash value to that of the entire taxable property of the state. To this end Section 3 is directed as specially applicable to all property not employed in banking, nor embraced within the purview of Section 4."

Construing the three sections together, the Court held that the taxation of the property in question would result in double taxation. The case is of value here only as evidencing the views of the Court as to the construction to be placed upon Sections 1 and 3 of Article 9, of the Constitution of the state.

In the case of *State v. Cooley*, 62 Minn. 183, arose a question as to the validity of an ordinance of the city of Minneapolis, exempting certain property used as a market house from taxation. A private corporation had been organized for the specific purpose of erecting a building upon defendant's own land, and furnishing in that building and in the adjoining street, a market place. The proprietors of the property entered into a contract with

the city of Minneapolis evidenced by said ordinance and a written agreement, that the said premises should be used exclusively as a public market for a period of twenty-five years. The ordinance provided that for said period the entire premises should be exempt from taxation. The validity of the ordinance was assailed on the ground of its repugnancy to Article 9, Section 3, of the Constitution of Minnesota. The Court say:

> "Clearly the exemption clause in the Constitution was never designed to cover such a case. If it was, the legislature could amend the present statute so as to exempt from taxation street car, water, gas and electric light companies, and a variety of private enterprises organized and operated for pecuniary gain, but owned by the public in the same general sense, serving the public, and devoted to or used for public purposes as exclusively as is the property in question. We are sure that an amendment to the tax law through which such an exemption was attempted, would at once be pronounced unconstitutional."

In *State v. Pioneer Savings & Loan Co.*, 63 Minn. 80, was involved the question of the validity of a statute of Minnesota providing for the taxation of certificates or shares of stock issued by building and loan associations. The legal effect of the statute was to exempt from taxation the non-resident holders of such certificates or shares. Referring to Sections 1 and 3 of Article 9 of the Constitution, the Court say:

> "These provisions of the fundamental law of the state are imperative, and require that taxes shall be uniform and equal as near as may be, and that all property not exempted by the Constitution shall be taxed according to its true value in money. The method of securing these results is left with the legislature, and the mere fact that the statute here in question seeks to take building and loan associations of the class to which the defendant belongs, out of the operation of the general tax laws of the state, does not make the statute unconstitutional, provided it secures substantially equality of taxation of all the property held or owned by the class for whose benefit the law was enacted. *But whatever the method adopted, the legislature cannot, directly or indirectly, exempt any property from taxation which the constitution does not so exempt.*"

The foregoing case is authority upon the point that any exemption undertaken by the legislature, not expressly authorized by Section 3, Article 4 of the Constitution, is void. And the Court further say:

> "The test, then, of the validity of the statute which we are considering, is whether or not it in effect exempts from taxation any substantial part of the property of building and loan associations."

The Court indulges in the *obiter* remark, quoted by counsel for the St. Paul & Duluth R. R. Co.:

> "It is true, as claimed by counsel for defendant, that the law providing for the taxa-

> tion of property is not unconstitutional because in its practical operation property which ought to be taxed escapes the burden."

But the Court immediately proceeds to say: "*But such is not this case.*" We fail to see, therefore, upon what ground the learned counsel claim "that it is a conclusive authority on the proposition that the act of March 3, 1865, in providing for a system of taxing the gross earnings of the St. Paul & Duluth Railroad, as representative of its property, was constitutional, etc." It was necessary for the Court to construe Sections 1 and 3, and it was apparent to it that certain property was not taxed at all, and hence the law was adjudged to be unconstitutional.

In *State v. Lakeside Land Co.*, 71 Minn. 283, was involved the validity of a statute providing for the taxation of mining property in the state, as follows: "For each ton of copper, 50 cents, and for each ton of iron ore mined and shipped or disposed of, 1 cent."

The Court, basing its opinion upon the legal effect of Article 9, Section 1, of the constitution, say:

> "It would be difficult to conceive of a system of taxation more obnoxious to the constitution."

The argument advanced by counsel for the plaintiff in error, that a gross earnings system of taxation is justified by the fact that the revenues derived

by the state will increase with the growth in the volume of business transacted by the company, is met by the legal force of the case just cited. It is clearly equally true that the revenues derived by the state from such a method of taxation of mining property would increase with the increase in the output of the mines.

The case last cited is especially important because of the fact that it is the first case where the question is squarely presented, arising in the State of Minnesota, unaffected by the constitutional amendment of 1871, whether the legislature can adopt an arbitrary rate of taxation based upon the volume of business. The decision is a clean cut denial of the doctrine.

In the case of *State v. Luther,* 56 Minn. 156, cited by plaintiff in error in several briefs of counsel, and greatly relied upon by them, an attempt was made to secure the taxation *in specie* of the granted lands of the St. Paul & Duluth Railroad Co. Two questions were presented for the consideration of the court, the one, a construction of the granting act under which the company claimed immunity from ordinary taxation, and the other, the constitutionality of such granting act. The first question is immaterial here. As to the constitutional question, namely, whether Sections 1 and 3 of Article 9 of the constitution, permit the taxation of said granted lands under a gross earnings tax imposed upon the earnings of the company, the Court declined to express an opinion, and said:

> "Conceding, without deciding, that tax laws such as we are now considering, were invalid when enacted, still we are of the opinion that the effect of the constitutional amendment of 1871, (Article 4, Sec. 32 (a)), was to validate all such laws relating to the taxation of railway property."

A re-argument was asked for and denied, but the Court in denying such application, took occasion to remark:

> "But inasmuch as an obiter remark in the opinion might be understood to mean that acts providing for a commuted system of taxing railroad property and granted lands, constitute contracts between the state and the railway companies which cannot be repealed or amended, it is proper to say that no such question was before the court, and that the remark referred to was not intended to express or intimate any opinion on that point."

It goes without saying that after the Court had held that the amendment of 1871 was a validation of the pre-existing legislation providing for a gross earnings method of taxation, all that was said as to the legislative power of the state in providing for the taxation of railroad companies, or others, was mere *obiter*. It is worthy of note, too, that the able justice who wrote the opinion in *State v. Luther, supra,* wrote the opinion also in *State v. Lakeside Land Co., supra.*

We fail to perceive the force of the argument advanced for plaintiff in error, founded upon the

language of Section 1 of Article 9 of the state constitution. Even if we were to concede the construction urged by counsel that a gross earnings method of taxation is permissible under that section, would that establish a legislative right to enter into a contract which disregards increasing values, and undertakes the impossibility of prescribing a fixed rule that will measure justice in taxation for a century or more? Whether a gross earnings tax be or be not permissible, it is clear that one legislative body cannot tie up the hands of a future one. To hold that the legislature of Minnesota had the power in 1865, or other years prior to 1871, to contract for a three per cent gross earnings tax, is to hold that the constitution does not require equality and uniformity of taxation, and does not prohibit exemption save as to enumerated classes. It is as repugnant to a proper construction of the constitution that a gross earnings rate may be a fixed quantity, as that a fixed value of real estate may be adopted. It is idle to attempt to draw a distinction between the two methods based upon the fact that under the former the tax will increase with the growth of the volume of business transacted by the railroad company, which would not be true of real estate. As no legislature has been endowed with the wisdom to so forecast the future as to know what the volume of business of a given railroad company, or the extent of the burden of taxation imposed upon other property, will become in future years, so, manifestly, the wholesome rules of the Minnesota constitution never contemplated that the

legislature should attempt a scheme of taxation invariable and incurable in its nature, embodying such an element of uncertainty. Granting, for the purpose of argument, that a gross earnings system is permissible, there necessarily accompanies it the power to change and rectify it as inevitable mutations in conditions shall from time to time require. And this is in accord with a recent decision by the Supreme Court of Minnesota, where it is said:

> "But we are of opinion that under our constitutional provisions requiring uniformity of taxation, the legislature cannot, even in aid of a public purpose, make an irrevocable contract exempting private property from future taxation, because, even if it is admitted that thereby the legislature did nothing more than anticipate such future taxes and apply them in advance to a specific public purpose, still it is impossible for the legislature to tell at present what in such a case will be uniform taxation in the future, or that by such arrangement such property will bear its just and equal share of such future taxation."

Counsel combat the view thus expressed by the Supreme Court of Minnesota upon two grounds:

1. That the legislature is not confined by the constitution to fixing a new rate of taxation every year; and

2. That the doctrine is overruled by the decisions of this Court.

It is asked: "May not the legislature fix a rate on land for five years to come, and leave the rate on personal property to be fixed annually?"

If this were conceded, it would not militate against the views of that court. For sound public reasons a legislature might provide that the assessment of real property shall not be made as frequently as that of personal property. The nature of the subjects would warrant such a rule.

But the Court rests its decision upon the ground that under the constitutional rule of that state the legislature must be at liberty at all times to seek uniformity and equality of taxation. It is to be presumed that it will always seek to accomplish it. In the very nature of the case an inflexible rule is unconstitutional, because uniformity and equality cannot be secured under it. As well might it be urged that the legislature had the power under the constitution of Minnesota to commute taxation forever by the acceptance of a gross sum. Does the principle differ when it undertakes to accept annual payments instead? It is commutation in either case. Was the legislature in any better position in 1865 to fix upon an adequate gross earnings rate as a just equivalent for taxation of their lands, than it was to fix upon an adequate fixed sum payment? In either case it was clearly impossible, as the state court remarked, "for the legislature to tell at present what, in such a case, will be uniform taxation in the future, or that by such arrangement such property will bear its just and equal share of such future taxation."

We now call attention to cases cited by counsel for the plaintiff in error, in support of the proposi-

tion that the doctrine of the Supreme Court of Minnesota is overruled by this and other courts.

An examination of *Piqua Bank v. Knoop*, 16 How. 369, will show that no such question was adjudged.

A general banking law passed in 1845 prescribed a method of taxation. Banks accepting the provisions of the act and complying therewith, were to be so taxed, which tax was to be in lieu of all other taxation. An act was passed in 1851 materially modifying the earlier act. The earlier act was held to be a contract with accepting companies. Neither in the statement of facts, the briefs of counsel, nor the opinion of the Court, is there any reference to the Constitution of Ohio. So far as the case discloses, the legislature was free to act in 1845.

In *Jefferson Bank v. Skelly*, 1 Black 436, was involved a similar question to that involved in the Knoop case, and the decision therein was followed. No reference whatever is made to the constitution of Ohio, save to the new constitution adopted subsequent to the making of the contract.

In *University v. People*, 99 U. S. 309, the constitution of 1848, under which the contract was made, provided:

> "The property of state and counties, both real and personal, and such other property *as the General Assembly may deem necessary for school*, religious and charitable purposes, may be exempted from taxation."

In 1870 a new constitution was adopted radically different from that of 1848. A statute was enacted providing for taxation in conformity with the requirements of the constitution of 1870, and thereupon the authorities of the state sought to subject the property of the university thereto for the purpose of taxation.

The above statement of facts is enough to show the inapplicability of the case to the one at bar.

In *Asylum v. New Orleans*, 105 U. S. 362, the charter of the institution provided that all the property, real and personal, "be and the same is hereby exempted from all taxation either by the state, parish or city in which it is situated, any law to the contrary notwithstanding."

The property in question was a cotton press bequeathed to the institution, and it was stipulated that the revenues of the press were to apply to the keeping and maintaining the objects of charity mentioned in the charter of the asylum. The constitution provided:

> "The general assembly shall have power to exempt from taxation property *actually used for church, school or charitable purposes.*"

There was no question by the state court but what the contract was permissible under the constitution. Inasmuch as a standing law of the state authorized the abrogation of corporate charters, it was not deemed by the court that the power included the power to alter and amend. In short, it was held by this Court that the exemption was expressly au-

thorized by the constitution. The question of uniformity or of equality of taxation does not appear to have been raised. It certainly was not considered by this Court.

So it is manifest that none of the decisions of this Court, cited and relied upon by counsel, are in point.

The same conclusion must be reached, we think, as to the cases cited from the courts of several states.

Under a constitution providing that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe," the Supreme Court of Wisconsin in several cases, notably *M. & M. R. R. Co. v. Supervisors*, 9 Wis. 431, and *Weeks v. Milwaukee*, 10 Wis. 186, held that exemptions were precluded. These cases were, however, overruled by *W. C. R. R. Co. v. Taylor*, 52 Wis. 37. In the last named case the question was whether the lands of a railroad company were exempt from taxation by reason of the terms of a granting act which stipulated that the lands should be exempt for a term of years. It was held that the exemption was valid. The views of the Wisconsin Court leave no room for doubt that had the constitution of that state been like that of Minnesota, the decision would have been in accord with the views of the defendant in error in the case at bar. At Page 63 of the opinion, the Court say:

> "The import of the provision in the Iowa constitution was the nearest approach to the one adopted in this state, but the phraseology

used was very different. The question of prohibiting all exemptions and authorizing certain exemptions was brought prominently before the convention, and after discussion to the effect that the naming of certain exemptions would impliedly prohibit the legislature from granting any others, the convention refused to specifically name the property to be exempted, so an amendment was proposed in these words: 'Section 1. All taxes levied in this state shall be uniform and equal, and shall be assessed upon a just valuation of real and personal property.' But the amendment, with another section relating to exemptions, was voted down. This proposed section, so voted down, was almost identical with a portion of the section then existing in the constitutions of Tennessee, Arkansas, Louisiana and Texas, but in Texas, Arkansas and Louisiana it had an additional feature.

"The section originally proposed in open convention was: 'Section 1. All taxes levied in this state shall be as nearly equal as may be,' *with another section covering exemptions.* But finally the latter section was stricken out, and the first section was amended by adding the words 'and shall be levied upon such property as the legislature shall prescribe.'

"It would appear from the debates in the convention that some were in favor of binding the legislature firmly, both as to taxation and exemptions, while there were others who favored flexibility as to both. The result was a compromise, and the adoption of the unique expression upon the subject found in our fundamental law. Possibly it would have been bet-

ter for the people at large, had the constitution, in addition to a *uniform rule of taxation, required an equality of valuations and assessments, and prohibited all discriminations, by provisions similar to those which then existed in some of the constitutions to which we have referred.*"

Criticising one of the earlier decisions of that court, holding to a contrary doctrine, in *Weeks v. Milwaukee,* 10 Wis. 108, and wherein a remark of the Court in *Exchange Bank v. Hiems,* 3 St. 15, that "uniformity in taxation implies equality in the burden of taxation," was approved, the Court further say, at Page 70:

"But the learned Justice failed to note that Bartlett, C. J., was construing a section in the Ohio constitution adopted *three years after the constitution of this state was adopted,* and which, instead of following the language of our constitution, read as follows: 'And laws shall shall be passed taxing by a uniform rule *all* (the italics are the court's) moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also *all* real and personal property according to its true value in money,' except certain exemptions named. And so it appears that Bartlett, C. J., was construing a constitution containing an important provision taken from constitutions *which our convention in substance refused to adopt,* and hence he said: 'This provision requires *all property* of every description in the state, to be taxed by a *uniform rule,* and at its *true value in money,* with the exception of certain

> enumerated exemptions.' (The italics are in the original.) Under such a provision there would be no difficulty in holding that all property of every description in the state must be taxed at its true value in money by a uniform rule, and hence the burden of taxation would necessarily be equal. But the legislature of Wisconsin were never under any such constitutional restriction, and the people in constitutional convention assembled refused to so limit the legislative power."

No constitutional question like the one at bar was involved in *Trustees v. Iowa*, 46 Ia. 275, which was merely a construction of the statute. The statute of that state provided for the exemption of "all publice libraries, grounds and buildings of literary, scientific, benevolent, agricultural and religious institutions and societies devoted solely to the proper objects of these institutions." The main question there decided was, whether the residence of a professor of a college, and the residence of a bishop who was rector of a church, were exempt under such statute. The only other question considered was, whether the statute violated Sec. 3, Article 1, of the constitution of that state prohibiting the making of a law respecting an establisment of religion, or the free exercise thereof, or compelling one to attend or maintain a place of worship. The main question was answered in the affirmative.

Two Kansas decisions are cited by plaintiff in error. In the first of these, *Gulf Railroad Co. v. Morris*, 7 Kan. 210, the only important question

presented of a constitutional nature was, whether the mode or manner, not the power, of assessing railroad property, was constitutional. There was no question of contract. Under a general law the property of the railroad company was assessed by different officers than the ordinary assessing officers. The constitution provided that "the legislature shall provide for a uniform and equal rate of taxation." The Supreme Court of Kansas say:

> "The constitution does not require the manner or mode of assessing and taxing property, or the manner or mode of collecting the taxes, shall be equal or uniform; but it simply requires that all property shall be taxed at a uniform and equal rate."

If in that case the company had been contending that by reason of certain legislation it enjoyed the vested right of having its property taxed at some particular rate, or in some particular manner, the case had then been of value now. Such was not its nature, however, and we fail to perceive its present importance to this discussion.

Nor was there in *Francis v. A. T. & S. F. R. Co.*, 19 Kan. 303, anything which supports the argument of the learned counsel. There the question was whether railroad property situate in unorganized counties, could be assessed by the state auditor, as provided in the statutes of that state. Citing and following *Gulf Rd. Co. v. Morris*, it was said that the constitutional requirement "does not compel the use of but a single mode of assess-

ment." No contract was or could be asserted or passed upon. It was but another holding to the effect that the constitution of Kansas did not prevent the particular mode of taxation. Calling attention to the constitutional provisions of the several other states, Mr. Justice Brewer says:

> "In all these provisions will be noticed either an express direction to tax all property, or an express prohibition on exempting any other than certain specific property. Our constitution does neither. Does it mean the same without as those do with? The positive language of these two sections sustains, if it does not compel the positive assertions of the various decisions cited by counsel. *Those decisions rest upon the clear commands and prohibitions of the constitution upon which they were based, and are therefore only of limited and qualified application here.*"

The whole decision is summed up in the following language:

> "We hold, and that is all that is necessary for this case, that where the rate of taxation is fixed by legislative enactment, or the assessment of all of a particular kind of property throughout the state, such as railroad property, is made by a single state board of assessors, and where a part of such property is in the unorganized counties in which is no machinery for or attempt to collect taxes, and therefore no board of equalization, that a failure to provide for a re-examination of assessments of such property in such unorganized

counties, or an equalization thereof by a state board of equalization, does not render the tax void."

In *Louisiana Lottery Co. v. State,* 24 La. An. 86, no question of contract was presented, but merely the authority of the legislature to commute the tax of the plaintiff.

In *City of New Orleans v. Kaufman,* 29 La. An. 283, was involved an ordinance of the city of New Orleans exacting a license from junk dealers. *Held,* that it did not violate the rule of uniformity or equality.

In *New Orleans v. Davidson,* 30 La. An. 544, was involved the question whether the legislature was authorized to exempt certain real and other property. Reference to the constitutional provisions of Louisiana is sufficient to demonstrate the correctness of the above decisions.

People v. Auditor, 7 Mich. 84, and *Youngblood v. Sexton,* 32 Mich. 406, were rightly decided, in view of the constitution of Michigan, which has not only adopted a rule of uniformity, but declared "that taxes shall be levied upon such property *as shall be prescribed by law.*"

State v. Runyon, 41 N. J. Law 98, was rightly decided under the constitution of New Jersey; yet in truth there was no other ground for the objection made to the statute. It was a question whether the rule of uniformity had been observed in the taxation of mortgages. How little merit there was to the objection, appears from the following excerpt from the decision:

"The precise objection made by counsel to this law in this respect, is that it lacks the quality of uniformity, in that it does not subject all mortgages alike to taxation, but leaves the question whether the owner of a mortgage shall submit to taxation on it at the mere caprice of the mortgagee. If regard be had to the substance of the law, and not to mere form, it is apparent that all mortgage interests are in effect made by this act liable to taxation. If the mortgagee chooses to pay that part of the tax which would be represented by the value of the interest of the mortgagee, he may do so. In that event, the mortgaged premises are valued without any abatement in valuation because of the mortgage debt. If, on the other hand, the mortgagee is unwilling to pay that part of the taxes which is appertainable to the mortgage interest, he may do so by claiming a deduction thereon. And in that event, instead of taking a receipt for that portion of the tax, as he was permitted to do under the act of 1854, and being allowed the amount on account of the interest of the mortgage debt, he may do so by simply claiming a deduction, and then the tax is laid in form directly upon the mortgage."

Kittanning Coal Co. v. Commonwealth, 79 Pa. St. 100, was another case involving only the question of uniformity. The question of the effect of the enumeration of specific exemptions upon the power of the legislature of that state to make additional exemptions, can never arise, because of the effect of Sec. 2 of Article 9, which makes all such attempts void.

In *Mississippi Mills v. Cook*, 56 Miss. 40, it is expressly held that, while the legislature may exempt classes of property from taxation, *it cannot withdraw property from taxation beyond the reach of legislative recall or influence.* The Court say, at Page 54:

> "The true view is that this provision of the constitution fixes beyond legislative act the condition of the property of all corporations for pecuniary profit, as being always liable to the exercise of the taxing power, so as to subject it, at the will of the legislature, to the same taxation as the property of individuals may be subjected to. The legislature may exempt property of a certain class, whether owners be corporations or natural persons, but corporate property shall never be placed beyond the reach of the taxing power. *It may not be taxed, but it must be ever liable.* It need not be 'subjected' but it must always be 'subject' to taxation, the same as that of individuals, for the constitution so declares. The provision is mandatory as to universal liability to pay taxes, but permissive to the legislature to tax the property of such corporations as it may see proper, in common with the property of individuals, which may be taxed or not for the time being."

In short, under the constitution of that state the legislature cannot enter into contracts, irrevocable or otherwise, granting away the sovereign right of taxation. This was so in the face of language less stringent than that of Article 9, Section 3, of the

constitution of Minnesota. The constitution of Mississippi expressly provided that the legislature "may provide for a special mode of valuation and assessments for railroads, and railroad and other corporate property."

In *Illinois Central Railroad Co. v. McLean,* 17 Ill. 291, the Court sustained a gross earnings law. This was based upon the language of the constitution which empowered the general assembly to tax "persons using and exercising franchises and privileges, in such manner as they shall from time to time direct."

But in the later case of *Hunsacker v. Wright,* 30 Ill. 146, it was expressly held that while the legislature might commute, it had no power under the constitution to exempt any person or class of persons from the payment of taxes, a doctrine which had been announced in earlier decisions.

Trustees v. McConnell, 12 Ill. 138,
adhered to in later cases.
Northwestern University v. People, 80 Ill. 333;
Same v. Same, 86 Ill. 141.

The question of contract was not presented or considered in any of the Illinois cases above cited.

Under the constitution of Arkansas the legislature is held authorized to select the classes of property "subject to taxation."

In *State v. Crittenden County,* 19 Ark. 360, the words "subject to taxation" were italicised. In the case of *Pike v. State,* 5 Ark. 205, the right of ex-

emption was denied, but that decision was overruled by later ones in that state.

We desire to call attention to the case of *Hogg v. Mackay,* 31 Pac. 780. The constitution of Oregon provided that "all taxes shall be equal and uniform," and the legislature "shall provide by law for uniform and equal rate of assessments and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property." In the case last cited the Court say:

> "The language of the constitution is plain, simple, and easily understood, and manifestly operates as an absolute inhibition against the exemption, either directly or indirectly, of any property from taxation, except that specially enumerated."

A line of decisions has arisen within the State of Minnesota construing grants, in which it is invariably held that a statute providing for a gross earnings method of taxation contemplates only such property, apart from the subject of grant, as is held and appropriated to the proper purpose of the corporation in its business of constructing and operating a railroad. Several cases cited by counsel representing the St. Paul & Duluth Company, at Pages 67 *et seq.* of former brief, are of that character. From what is said by counsel at Page 69, these cases were cited for the double purpose of showing (1) that the Supreme Court of Minnesota has always deemed the gross earnings method of taxation as not an exemption but a commutation

of taxes, and (2) that such a method is not a gratuity but an inviolable contract.

Unfortunately for counsel, the cases cited involved grants antedating the adoption of the constitution of 1858, with the exception of the Northern Pacific Co. case. But unfortunately again the term "obligation," as used in the quotation of counsel in their brief, did not refer at all to the grant to the Northern Pacific Co., but referred to the old territorial grant from which the St. Paul, Minneapolis & Manitoba Ry. Co. had derived its title, so that the contracts of which the Court was speaking were, in every case, contracts which the state is not attempting to assail.

As we have repeatedly elsewhere remarked, this is not so much a question whether a gross earnings, substituted, or commuted system, (whatever name be adopted), is permissible, as it is whether the legislature may by contract limit the power of the state over the subject. We deny, as already asserted, that the legislature can single out, under the constitution of Minnesota, one owner of real property and tax his property by a different rule from that which is prescribed for the taxation of the real property of other owners, of a similar character. The constiution forbids it in express terms; nor has it ever been countenanced by any decision of the Supreme Court of Minnesota. What that court has repeatedly said in construing territorial grants, argues, without a single exception, that but for the fact that the statutes were passed before the constitution was adopted, granted lands

could only be taxed *co nomine* and in conformity with the method adopted for the taxation of all other lands in the state. No case exists in that state holding that a contract could be made under the existing constitution independent of the amendment of 1871 thereto.

Replying to the remark of counsel, that from the earliest times it has been the common understanding of the authorities of the state that a gross earnings system of taxation is permissible, we repeat that such fact does not affect the question at bar. All this might safely be conceded without yielding an iota upon the general proposition that a railroad company's lands cannot be favored in the taxation system of the state. As the Supreme Court of Minnesota well said in this case:

> "The mandate of the constitution applies to all property which is the subject of private ownership, without reference to the source of its acquisition. It would be a palpable evasion of the constitution to permit the legislature to absolutely transfer public lands to private owners vested with privileges and immunities as to taxation which are prohibited by the constitution."

V.

The constitutional amendment of 1871 served merely to temporarily validate void laws and to authorize gross earnings legislation in the future.

So the Supreme Court of Minnesota holds:

State v. Stearns, 72 Minn. 200.

County of St. Louis v. D. & I. R. R. Co., 80 N. W. R. 626.

In both of the cases cited the doctrine is "that the constitution under which it is claimed that the lands in question are exempt from taxation in the ordinary way upon the basis of their cash valuation, were unconstitutional when enacted and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them. But this ratification or validation of the statutes was a qualified one, and the right to repeal or amend them was reserved by necessary implication, provided such repeal or amendment was adopted and ratified by a majority of the electors." (Record Page 69.)

> "Under the provisions of our constitution requiring uniformity of taxation and requiring all property, except certain specified exemptions, to be assessed by taxation according to its true value in money, the legislature had no power to pass a gross earnings law, except as permitted by said constitutional amendment of 1871."
>
> 80 N. W. R. 626.

The language quoted by counsel for the plaintiff in error from *State v. Luther* is, as we have already stated, *obiter*. The Court so admitted upon the application for re-argument. Counsel are therefore inaccurate in stating that it was decided "that a contract between the State and the Company which

insures to the railroad company a continuance of the right to have the commuted form of taxation is provided in the act." It is thus obvious that the statement of the Court made when denying an application for re-argument that "no such question was before the Court and that the remark was not intended to express or intimate any opinion on that point" was wholly overlooked.

It is a significant circumstance that on no occasion when that amendment has engaged the attention of the Supreme Court of Minnesota has language been used which either expressly, or by strong inference, supports the proposition advanced by the plaintiff-in-error that neither a repeal nor an amendment of a gross earnings tax law could be effected without the consent of the company affected by it. No such language is suggested for the consideration of this Court, because it cannot be discovered. On the other hand, the State Supreme Court has, on several occasions, in cases already cited, said that such laws may be repealed at the will of the legislature when ratified by a submission of the repealing act to a popular vote.

That this was the intention of the framers of the amendment is fully borne out by its own intrinsic evidence. It is prospective as well as retrospective. It applies to general as well as special laws. It was designed to prevent frequent changes in the taxation of companies. Significantly, it forbids repeal or amendment. If the people of the state had become alarmed by frequent and radical reductions in rates of taxation, the prohibition would have

been expressly aimed against further reductions and stopped there. Is it reasonable that by that amendment the people of the state commissioned the legislature to enact any law upon the subject, however unjust, general or special, which could never thereafter be changed without the consent of the companies affected by it? The position of counsel is that the legislature is now and always has been, regardless of the amendment of 1871, at liberty to enter into a contract with a railroad company upon the subject. However unjustly low the rate, whether three per cent or one-tenth of one per cent upon the gross earnings of a company, it will stand forever as the rule of taxation for that company, *unless the company shall consent to a change!* Such a constitutional provision would impeach the intelligence of both the legislature which submitted and the people who ratified it.

The only just construction which can be placed upon its terms, the one which accords with the spirit which must be presumed to pervade every constitutional provision—the protection of the public welfare, is the one adopted by the Court below.

Counsel press with great insistence the proposition that inasmuch as many of the previously enacted laws cleraly secured contract rights which could not be changed without the consent of the companies affected, it must be presumed that the same rule was intended to apply both to state and territorial legislation. *But the constitution has not said so.* It is a clear authorization both to re-

peal and amend. The power to amend implies the power to raise as well as reduce the rate of percentage. Can there be any question of the validity of an act which shall raise the rate provided it is ratified by popular vote? Does the constitution imply that future legislation shall impose a rate of three per cent and no other? Does it anywhere declare that future acts shall be valid only when accepted by the companies to be thereby affected? If a gross earnings tax is permissible, and the State Court has so held by reason of the amendment, must the legislature consult the wishes of railroad companies before an act is passed? And is it powerless to act without their sanction? Clearly, the people of Minnesota did not so unwisely amend their constitution that its legislature became dependment upon private interests when shaping future legislation. If this be true of future legislation, why is it not equally true of what had been previously enacted? There were past laws, as we know, and as the record shows, which had been passed since 1858 upon which the amendment would operate. Both past and future legislation therefore came within the reach of the amendment.

The amendment, as the Supreme Court of Minnesota holds, performs two offices: (1) It temporarily validated the invalid; and (2) authorized future legislation upon the subject.

It is obvious that the amendment can be resorted to by the plaintiff-in-error only upon the theory that without it the companies had no contracts. If that be found to be their situation, then it is con-

tended on their behalf that the amendment itself operated to make the several acts valid *ab initio* and hence created contracts as effectually as if the power to contract had not been originally wanting.

But there is a broad distinction between validating an unauthorized method of taxation and creating contract rights.

The continuance of the gross earnings method of taxation is not because any contract rights had been acquired, but because the people have so ordained by virtue of the amendment. *It was not to protect or benefit railroad companies that the constitution was so amended but for the protetcion of the people themselves.* If no contract did exist, what motives could have actuated the people of the state in thus creating them or providig for them in the future? Counsel have no where suggested, nor can they suggest, any ground for such action.

When, therefore, we search for the reason of the amendment, or the intention of its framers, it is found to be quite foreign to the object contended for by counsel.

Clearly, the companies must stand or fall upon the original force of the acts under which they claim. The amendment of 1871 does not in terms or by necessary implication create contract rights. Nor has the Supreme Court of Minnesota in any case ever held to the contrary. The language of Mr. Justice Mitchell, so largely and frequently quoted from *State v. Luther*, no where suggests it. The Minnesota Court has many times impliedly and, in several instances, has expressly, held that

the amendment by plain intendment confers upon the legislature unqualified power to continue or overthrow the gross earnings system as to all companies not taxed under territorial charters.

Whatever legislation has been enacted since 1871 is, so far as it exceeds the limitations imposed by the amendment, void. All state legislation, whether passed prior, or subsequent to, that year stands upon the same ground in such regard. It is all supported, so far as the method of taxation is concerned, only by force of the amendment. Nor should it be overlooked, that all of the cases adjudged by the state court since the decision in the Parcher case, not involving territorial grants, have been influenced by that amendment. The gross earnings method was sustained, not because contracts existed, but because it was a lawful method of taxation by force of the amendment. The weakness of the position of the companies is exposed by their own argument. They contend that there were but a few railroads paying gross earnings taxes in 1871 which were operating under charters granted by the legislature of the state. They admit that the amendment is prospective. They maintain that the legislature was powerless to act upon territorial charters without the consent of grantees. Do they also claim that the legislature could not pass a gross earnings law in future without the consent of the railroad companies to be affected by it? Such a claim would clearly be fatal, for it would be equally true that it was not a lawful method of taxation in 1865 and 1870. If

it became lawful by virtue of the amendment in 1871, and if it rests upon *value*, as counsel strenuously urge, then it is "monstrous," to borrow their own word, that the legislature should bind the state by irrevocable contract in a matter where there was full power to act without it, and no consideration was received. It reduces itself to this, that a railroad company by agreeing to pay its lawfully imposed taxes thereby so fetters the state forever after that it can impose no other tax. Clearly, such a proposition does not rest upon any sound view of the law of this country.

We submit that if the only purpose of the amendment was, as claimed, that there could be no reduction of the rate of taxation, and that that was the only evil to be guarded against, the language employed would have clearly so stated. It prohibits *repeals*. Will counsel argue that if the legislature had repealed the gross earnings provision of their grants, there could have been no further taxation? It prohibits *amendments*. Did the people of the state assume that railroad companies would assent to a raising of their rates?

The prime purpose of the amendment was to authorize a system of taxation and give it stability.

But we are brought back to the fundamental proposition that an invariable gross earnings rate cannot be, in the very nature of the case, a compliance with the constitution of Minnesota. It requires no proofs because self-evident. Whether it yields too much or too little at a given time, is to the Court immaterial.

It may have been deemed in 1871 as then productive of a fair amount of revenues to the state. The people of the state were willing to permit the existing rates to stand until time should demonstrate the need of change. But this does not argue that by the amendment of 1871, the constitutional rules of uniformity and equality, and its prohibition against exemptions, were to be abrogated.

It will be a more proper time to consider the validity of a gross earnings tax, as to other subjects, when a case involving that question arises.

The position of defendant in error finds great support in the following cases:

Welch v. Cook, 97 U. S. 541.
Railroad Cos. v. Gaines, 97 U. S. 697.
Huntington v. Worthen, 120 U. S. 97.

These cases were cited in our former brief. In addition to what is there said as to *Railroad Cos. v. Gaines, supra*, we note that the Memphis & Charlestown R. Co., one of the companies affected by the decision, claimed a contract with the state by the acceptance of Section 11 of the act of 1875, and that the obligation of that contract was impaired by a subsequent law.

The plaintiff in error in the case at bar contends strenuously that this Court shall determine for itself whether or not the several railroad companies acquired contract rights by the several acts upon which they rely. But in the case cited the Court felt called upon to follow the construction placed by the state court upon the constitution of Tennes-

see. Counsel at bar contend for a distinction between this case and the *Gaines* case, on the ground of the lapse of time. We are unable to perceive how the action of this Court can be influenced by any such circumstance. The short of it is that this Court, in a case arising in 1878, involving a constitution adopted in 1870, and a statute under which a contract was claimed, enacted in 1877, followed the state court's construction of the constitution, and say:

> "If nothing had been done until the charter exemption expired, it is clear that under the construction which the courts of the state have given to the constitution, no contract for the taxation of the company according to the provisions of the eleventh section of the act of 1875 could have been sustained. The only question therefore which remains, is whether in 1875 the legislature could contract for a surrender of the remaining charter exemptions by binding the state not to tax the company for ten years in any other manner than that provided for in Section 11.
>
> "The constitution has subjected all property in the state to the burden of uniform taxation according to its value. So the courts of the state have decided. The legislature has no power to contract for relief from this burden. It could not do it for a money consideration, and if not for that, clearly not for any other. This is one of the disabilities under which the people of the state have placed their government. But for it taxes might have been commuted, or they might have been withheld.

> "There is no doubt of the power of the legislature to contract with a company for a surrender of its charter exemptions, in a way that did not involve a release from the constitutional mode of taxation after the charter exemption had expired. Such a release is, however, as we think, prohibited by the constitution as construed by the highest judicial authority in the state."

Counsel suggests what to us appears a very insufficient reason why the same course should not now be pursued by this Court. We request attention to a comparison of the constitution of Tennesee with that of the State of Minnesota. The constitution of Tennessee provides:

> "All property, real, personal or mixed, shall be taxed; but the legislature may except such as may be held by the state, by counties, cities or towns, and used exclusively for public or corporate purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational. * * * All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state.

The constitution of Minnesota is set forth in the early part of this brief.

With respect to the constitution of Tennessee this Court say:

> "Such a release (from taxation) is, however, we think, prohibited by the constitution as con-

strued by the highest judicial authority in the state."

In *Huntington v. Worthen, supra,* was considered the constitution of the State of Arkansas, which provided:

> "All property subject to taxation shall be taxed according to its value," and was to be "equal and uniform throughout the state."

It exempts certain enumerated classes of property.

This Court, in construing that constitution, say:

> "As thus seen, no part of the property of railroad companies is exempt from taxation, and any law which exempts it is in express terms declared to be void. But laws which indirectly produce such exemption must be equally inoperative. That cannot be accomplished indirectly which the organic law declares shall not be done directly. The assessment of property, that is, the appraisement and estimate of its value, is the basis upon which the amount of the tax is fixed. A law, therefore, omitting from assessment portions of any particular property, thus lessening the estimate of its value, has the effect of exempting it to that extent from taxation. That result canot be accomplished, as well observed by the Supreme Court of the state, under the guise of regulating the duties of assessors."

We emphasize that portion of the language just quoted, which declares that *the lessening of the estimate of the valuation of property is an exemption*

within the meaning of a constitution which forbids exemption. Any law, therefore, which has this effect, and which the Court can see must necessarily have such effect, is offensive to such a constitution. Such is precisely the question at bar.

The amendment of 1871, left the legislature with full power to act, with the exception that there was to be a *referendum*. It had the power to segregate granted lands for purposes of taxation from the other classes of real property. It was in position to treat the whole subject, as if for the first time presented, in such wise as it deemed expedient. It was in position to fix a new rate upon gross earnings or to tax the granted lands *co nomine* under the general tax laws of the state. But whatever action was taken by it, it would become operative as law only by popular ratification. What it did in effect was to declare that the three per cent gross earnings tax should be the rule for the taxation of all the property of said companies except their granted lands, which thereafter were to be taxed *co nomine*.

This view is fully sustained by the doctrine announced in the *Pennsylvania College Cases*, 13 Wall. 190. It is so, not only as to future legislation, but equally so as to past legislation. As to future legislation, it justifies the construction that the amendment of 1871 is a reservation saving to the state the right of amendment. So, as applied to past legislation, it is a complete answer to the argument of counsel that the power to repeal or amend is restricted to cases in which grantees have assented

thereto. In that case, a charter was construed containing the following language:

> (The constitution of the College) "*shall not be altered or alterable by any ordinance or law of said trustees, nor in any other manner than by an act of the legislature of the Commonwealth.*"

VI.

The Constitution of Minnesota becomes *eo instanti* upon all property, real and personal, when it passes into private ownership.

As the Supreme Court of that state said in this case:

> "If this proposition is true, then the legislature, if there are no other constitutional provisions prohibiting it, may provide for exempting from taxation the school lands of the state after their sale and after they have become absolutely private property, or provide that the owners thereof may forever pay a percentage on the gross or net income derived therefrom in lieu of all other taxation. The mandate of the constitution applies to all property which is the subject of private ownership, without reference to the source of its acquisition."

It is too plain for discussion that "these lands were not subject to taxation so long as they remained public lands," and that "they could not be taxed until after they passed out of public owner-

ship." But when they cease to be *public lands*, we might differ with counsel. Counsel proceed upon the assumption of a case where the state is itself engaged in the enterprise of building, as a sovereign, a railroad. But the state was doing nothing of the kind. She was merely extending her aid to private parties who had embarked in the enterprise as a private speculation. It argues nothing to say, as counsel do, that the state might have reserved the title to the lands and provided for a conveyance from time to time. In such event, they might not have been taxable for the reason that they would not have been brought before conveyance within the reach of article 9 of the constitution. We shall not concede, however, that the retention of the mere naked legal title by the state, to suit the convenience of the grantee, would have saved the grant from liability to taxation. In such case they would be *owned* by the company and would doubtless be taxable.

Carroll v. Safford, 3 How. 441.
Witherspoon v. Duncan, 4 Wall. 210.
Winona & St. Peter L. Co. v. Minnesota, 159 U. S. 526.
Dickerson v. Yetzer, 53 Ia. 681.
Rd. Co. v. Morris, 13 Kan. 302.

The cases cited by counsel from other states arose in matters where the state was undertaking, as a sovereign, to engage in public improvements. In Michigan she was building a canal. *People v. Auditor*, 7 Mich. 84. In Maine, she was authorizing a

city to provide itself with water. *Portland v. Water Co.*, 67 Me. 135. In Arkansas, she was providing for the raising of money by means of her swamp land grant to enable counties to drain their wet and overflowed lands. *State v. County*, 19 Ark. 360.

As to swamp lands, this Court has held that the grants thereof imposed no trusts upon the state.

> *American Emigrant Co. v. Adams*, 100 U. S. 61.
> *Mills Co. v. Chi. etc. R. R. Co.*, 107 U. S. 557.
> *U. S. v. Louisiana*, 127 U. S. 182.
> *Hagar v. Reclamation Dist.*, 111 U. S. 701.
> *Cook v. Auditor*, 79 Mich. 100.

As to the other grants this Court has said:

> "It is a conclusive answer to the proposition we are now considering that the United States have no more claim, legal or equitable, touching the lands here in question, than they have to lands which they have sold and patented to others in the regular course of the administration of the Land Department of the Government; and that Congress has not seen fit, either expressly or by implication, to impose any restriction upon the taxing power of the state. That subject was remitted, as, under the circumstances, it might well be, wholly to their wisdom and discretion."
>
> *Tucker v. Ferguson*, 22 Wall. 527.

The moment it is held that the Constitution of Minnesota prohibits the exemption from taxation of any other than the enumerated classes of property, nothing remains on which an argument can be founded that granted lands can be excepted from

the operation of the constitutional rule. A plain case is then presented for the application of the doctrine that no exemption can be presumed.

> *N. O. C. R. R. Co. v. New Orleans,* 143 U. S. 192.
>
> "A state cannot strip itself of this most essential power by doubtful words. It cannot, by ambiguous language, be deprived of this highest attribute of sovereignty. This principle is distinctly laid down in each of the cases referred to. It has never been departed from."
>
> *Erie R. R. Co. v. Pennsylvania,* 21 Wall. 492.

But this question is fully and completely disposed of in *Tucker v. Ferguson, supra.* It was there, as here, contended that the state, as trustee of the United States, was at liberty to enter into any contract it deemed advisable regardless of the provisions of the State constitution. That contention was strongly pressed upon the consideration of this Court, and was met and overthrown. There the state constitution reserved the right to alter, amend or repeal all laws under which corporations were organized. It will be readily perceived that, so far as the right to act in effectuating the so-called trust is concerned, the question is the same whether arising under such a constitution or under that of the State of Minnesota. The argument in either case is that the constitution does not apply because the trust presents a case *sui generis* and not within the contemplation of the constitution.

In *Tucker v. Ferguson*, it was urged by counsel in their brief that the State, as trustee, *had an interest in the lands inconsistent with taxation;* that it could and did enter into an indefeasible contract "that none but specific taxes should be imposed," and that the repeal of the act whereby the contract was made impaired its obligation.

In answer to such contention this Court there said:

> "The state accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might all have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The State did not in anywise abdicate her sovereignty by accepting the trust, but the former might be exercised to render more effectual the discharge of the latter. She was in nowise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be ultra vires and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further. Upon general prin-

ciples she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the state, proceeding in the execution of the trust, had transferred her entire title to the company,,and they had perfected their title and acquired the right to sell, the case assumed a very different aspect."

If the contention is sound here it must have prevailed there. We submit that the question is foreclosed by the decision in that case.

The legislature is no where given authority in disposing of them to enter into a contract whereby exemption or a commutation of taxes is secured. Such lands are not among the exceptions of Section 3 of Art. 9 of the Constitution either in terms or by implication. The constitution makes no exception in providing for the taxation of real property based upon ownership, or condition, except as provided in the said section. In order to sustain counsel's position, words must be imported into it which were never contemplated by its framers. The State *cannot* "bargain" in such wise, as to its "own public domain."

In this connection, counsel cite in support of their position the *Parcher Case, supra*. It is maintained that inasmuch as it involved a grant made subsequent to 1858 as well as the one previously made, it is therefore an adjudication that a contract could be made under the constitution exempting lands from taxation. The contention evinces a misconception of the decision in that case.

In the first place, the subject of the suit was the taxation of lands situate in the county of Wright in said state, which the Company had acquired under the Congressional grant of 1857, and the territorial grant of the same year. When the Court was discussing the question of taxation, (at p. 325 orig. ed.) referring to the Act of Congress of March 3, 1857, it says:

> "The plaintiff claims that certain lands (being part of the lands granted as aforesaid by Congress) which it has become the owner under the provisions of the *Act of May* 22, 1857, before referred to, and under subsequent legislation, not having been sold and conveyed by it, are exempt from taxation."

Again at the top of page 327, the Court say:

> "We can perceive no reason why such grant may not be a subject of legislation as *rightful* under a *territorial* as under a state grant."

There is no reference whatever to any grant made subsequent to 1858, nor is there any suggestion anywhere in the decision that lands acquired by a subsequent grant were involved. We have elsewhere called attention to the other cases decided by the Supreme Court of Minnesota, cited by counsel upon this branch of the case. We forbear repeating what is there said, but request that that portion of this brief be read in connection with this branch of the case.

VII.

Contemporaneous Construction.

To the contention that by long usage and acquiescence, the constitution has acquired a practical construction controlling upon the Court, we first reply that the question must be viewed in the light of the year 1871. Since the adoption of the amendment of that year, no occasion has arisen, nor could one arise, where anyone, whether official or otherwise, was called upon to determine the construction of the provision of Article 9 of the state constitution with reference to railroads, save, perhaps, those cases where was involved the question whether certain kinds of property came within the purview of the gross earnings tax. Gross earnings taxes upon railroad property were authorized by the amendment. Instead, therefore, of a case being presented in which there has been *forty years of practical construction,* the most that can be said is that such construction obtained for *a period of twelve years.* A line of cases is cited by counsel in which the Supreme Court of Minnesota has felt compelled to follow a long and well established practical construction. So also they cite, for the same purpose, a line of cases decided by this Court.

A reference to such cases will show that they announce no such doctrine as will authorize a departure in the case at bar from the plain meaning of the Minnesota constitution.

In *Carson v. Smith,* 5 Minn. 61, the Court call attention to the fact that many interests had arisen

under the statute which was assailed and that such fact would cause the court to hesitate long before overruling the statute. But the case was decided wholly upon other grounds.

In *Green v. Knife Falls Boom Co.*, 35 Minn. 161, arose the question whether a special act passed in 1872 conferring new powers upon a corporation was valid. Many similar acts had been passed which had been recognized by the "legislature or the *courts*." In 1871 the constitution was again amended so as to plainly prohibit such legislation. Say the Court:

> "This amendment * * * indicates a change of policy, and unquestionably inaugurates or restores the strict rule of construction as to all subsequent legislation affecting the charters of *existing* corporations."

In *City of Faribault v. Misener*, 20 Minn. 396, the question was whether a poll tax was valid. It had been provided for in numerous municipal charters and ordinances framed thereunder. "This long continued acquiescence of the people in the laws" was deemed decisive of the question. But, while the court so expresses itself, the case was decided upon another point, namely, that no provision had been made for collecting the tax.

In *Ames v. Lake Superior & M. R. Co.*, 21 Minn. 288, the question whether a special law incorporating the defendant was valid. The Court say:

> "We entertain some doubt whether, in this case, the legislature has not gone quite as far as

> strict construction would permit; but we do not feel that certainty of construction upon it, which, under the rules of interpretation by which courts must be governed in interpretating statutes in respect to their constitutionality, would authorize us to declare this act void."

In their reference to long legislative construction and popular acquiescence, it there remarks:

> "It is not meant by this that a clearly and obviously erroneous construction of the constitution may become controlling by legislative adoption, but that, *in a case of doubt*, the Court may and ought to resort for aid to the acts of the legislature and the people, in construing the provisions of the constitution alleged to have been violated."

In *State v. Moffett*, 64 Minn. 292, a statute had stood for thirty-six years which permitted to taxpayers a deduction from the gross amount of credits returned for taxation, the amount of their bona fide indebtedness. Not only had there been executive recognition of the validity of the statute for many years, but say the Court:

> "Again the validity of this statutory provision has always been taken for granted in the *judicial department* of the state government."

In *Stuart v. Laird*, 1 Cranch 299, it was argued that the judges of this Court had no right to sit as Circuit Judges. The Court say:

> "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer and has fixed the construction."

In *Martin v. Hunter's Lessee*, 1 Wheaton, 304 was involved the question whether the jurisdiction of this court extends to the final judgment of a state court. The court had no trouble in sustaining jurisdiction upon the plain language of the constitution, and say:

> "Strong as this construction stands upon the general language of the constitution, it may still derive support from other sources."

The Court then advert to a historical consideration of the subject, and further say:

> "This weight of contemporaneous exposition by all parties, this acquiescense of enlightened state courts, and other judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubt."

In *Cohen v. Virginia*, 6 Wheat. 264, Mr. Justice Marshall, while discussing the 11th amendment with respect to the question of jurisdiction of the federal courts, adverts to the Judiciary Act, the Federalist, and "the uniform decisions of this Court," and says:

> "This concurrence of statesmen, of legislators and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction." (p. 421).

And further on the Chief Justice remarks:

> "Let the nature and objects of our Union be considered; let the great fundamental principles on which the fabric stands, be examined; and we think the result must be, that there is nothing so extravagantly absurd in giving to the court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require *that words which impart this power should be restricted by a forced construction.*"

In *Conley v. Port Wardens*, 12 How. 299, the Court decide the question wholly without reference to contemporaneous exposition, and the Court say:

> "We have not adverted to the practical consequences of holding that the state possesses no power to legislate for the regulation of pilots; though in our apprehension these would be of the most serious importance." (p. 321.)

In *Lithographic Co. v. Sarony*, 111 U. S. 53, the question was whether Congress had the power to protect photographs and their negatives by copyright. The Court admit that the "*question is not free from difficulty,*" and adverted to the copyright act of 1790 as an aid to the question. Mr. Justice Miller then adds:

> "We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs," etc.

This construction had been observed for nearly a century.

In The *Laura*, (*Pollock v. Steamboat Co.*), 114 U. S. 411, the question was the authority of the Secretary of the Treasury to remit penalties, *an authority which had been exercised for a century.* Indeed, as this Court there say, the question had been previously decided by the case of *U. S. v. Morris*, 10 Wheat. 246.

If, therefore, counsel are to depend upon the force of contemporaneous construction, they have failed to establish a rule in their support by the cases cited.

We maintain that the record does not present a case justifying the application of the rule of contemporaneous exposition. In the first place, the language of the constitution is not doubtful, and will be followed unless the most cogent reasons to the contrary countervail.

In 1895 the Supreme Court of Minnesota declined to follow a practical construction of the constitution of that state which had stood for 37 years.

State v. Sutton, 63 Minn. 147.

The doctrine is ably discussed by Judge Cooley in the following language:

> "Where, however, no ambiguity or doubt appears in the law, we think the same rule ob-

tains here as in other cases, that the court should confine its attention to the law, *and not allow extrinsic circumstances to introduce a difficulty where the language is plain.* To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. 'Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.' While we conceive this to be the true and only safe rule, we shall be obliged to confess that some of the cases appear, on first reading, not to have observed these limitations. In the case of *Stuart v. Laird,* above referred to, the practical construction was regarded as conclusive. To the objection that the judges of the Supreme Court had no right to sit as circuit judges, the court say: 'It is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest. and ought not now to be disturbed.' This is certainly very strong language; but language very similar in character was used by the Supreme Court of Massachusetts in one case where large and valuable estates depended upon a particular construction of a statute, and very great mischief would follow from changing it. The court said that 'although if it were now *res integra,* it might

be very difficult to maintain such a construction, yet at this day the argument *ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words.' Language nearly as strong was also used by the Supreme Court of Maryland, where the point involved was the possession of a certain power by the legislature which it had constantly exercised for nearly seventy years.

"*It is believed, however, that in each of these cases an examination of the constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation,* and that the cases are not in conflict with the general rule as above laid lown. *Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it.* A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction

of the constitution. *We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed.*" *Cooley, Const. Lim.* 84, 86.

VIII.

The grant to Minneapolis and St. Cloud Rd. Co. does not contemplate that its granted lands shall be taxed by a gross earnings method.

The charter properly so-called of the company contained no stipulation as to taxation. (S. L. 1856, c. 160, as amended S. L. 1864, c. 5, S. L. 1865, c. 4.) The act under which its grant was bestowed was also silent upon the subject. S. L. 1865, c. 3.

The language whereby exemption is claimed, is as follows: S. L. 1870, c. 52. See act in full in early part of brief.

> "That in consideration of an annual payment of a per centum upon the gross earnings of the Minneapolis & St. Cloud Railroad, as herein provided, the road, its appurtenances and appendages, and all other property, estate and effects of the Minneapolis & St. Cloud Railroad Company which they have already acquired, or which they may hereafter acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal,

> repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all assessments and taxation, etc. * * * And the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever."

It would seem that by the terms of the act the percentage tax is restricted to property which the company "use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad," and its stock and capital. The method was to be "forever." We find no provision that the lands were to be taxed when sold and conveyed.

The rule that a case of exemption must be clearly shown, can find no more appropriate application than to the grant of the St. Cloud Co.

The language employed should not be extended beyond the fair meaning of its terms.

The exemption from ordinary taxation extends only to such lands as are held and used for the proper purposes of the corporation.

Bank v. Tennessee, 104 U. S. 493.
County of Ramsey v. Chicago, M. & St. P. Ry. Co., 33 Minn. 537.

This same provision was involved in

County of Todd v. St. Paul, M. & M. Ry. Co., 38 Minn. 163.

where it was held that it did not apply to large tracts of timber land purchased by the corporation.

Matter of Swigert, 119 Ill. 83.
State v. Commissioners, 23 N. J. L. 510.
Mil. & St. P. Ry. Co. v. City, 34 Wis. 271.

The lands owned by the Minneapolis & St. Cloud Co are described on page 21, Fourth Sub. of the Record.

That exemption cannot be predicated upon the fact that the stock and capital are expressly named would seem clear. Capital and stock have a well understood meaning.

Capital is the property or means contributed by the stockholders of a corporation.

Bailey v. Clark, 21 Wall. 284.

Capital stock in an act exempting the capital stock of a railroad from taxation does not include the property into which the capital has been converted.

Railroad Co. v. Gaines, 97 U. S. 697.

Nor are lands granted by Congress within such an act.

Railroad Co. v. Loftin, 30 Ark. 693.

In *Rd. Co. v. Shocklett*, 30 Mo. 550, the term was held to include the roadbed, machinery, depots, and other property used in operating the road, yet this was recognized as an unusual extension of its meaning.

Accumulated profits which have not been divided

among the stockholders, are not a part of the capital stock so as to be exempt from taxation.

Bank v. City of Milwaukee, 18 Wis. 281.

It is incredible that the legislature should have intended to exempt so important an element of the property of the company without clearly saying so.

IX.

The law of 1895 was fairly submitted.

Counsel suggests that the passage of the law was obtained by a cunning devise. This is based upon the form of the ballot employed in the statute.

It is evident that counsel were late in the discovery of the fact against which they now complain. It was not suggested in the former briefs filed and first found expression upon oral argument at the final hearing. It was never suggested in either of the state courts in any of the cases which have arisen since the submission of the act.

The suggestion that the form of the ballot was purposely made deceptive is wholly without foundation. The form of ballot was provided for in the law itself. It related to a subject which had ilicited extensive public discussion for several years in the legislature, by the public press, and elsewhere. Moreover, under a law of the state, the character of the act submitted was stated in the official synopsis of measures submitted to popular

vote which was posted in every election precinct in the state.

We confess surprise that counsel have been pleased to inject into this case a suggestion so unwarranted and baseless.

X.

The second clause of Section 9, specifying the classes of property which may be exempted, is exclusive of any further right of exemption.

A similar question arose in New Hampshire, where it was construed that under one provision of the constitution of that State the requisite power had been conferred to provide for the taxation of certain property. But the contention was answered as follows:

> "But if it is claimed * * * that the power of taxation is conferred by Article 2 of our constitution, which declares that 'the supreme legislative power in this state shall be vested in the senate and house of representatives, each of which shall have a negative upon the other; * * * it may be urged in reply, that, granting all the power of taxation is conferred by Article 2, it is limited and restricted by the terms of Articles 4 and 5, which follow. Those articles define, with great particularity, the power which may be exercised by the general court, and would seem to confer all the power required by that body to enable it 'to

provide for the necessary defense and support of the government, and the protection and preservation of the subjects thereof.' If Articles 4 and 5 were not understood and intended as restrictions and limitations upon the general power conferred by Article 2, it is difficult to understand why they were inserted. They were unnecessary, for they do not enlarge the power of the general court as conferred by Article 2, and unless they may be treated as restrictions they are useless. If they are restrictions, it might be suggested that the whole power of taxation is contained in that part of Article 5 which authorizes the levy of proportional and reasonable taxes on all inhabitants and residents of and estates within the state; and that they restrict the power not only to the manner of the levy, but to the subjects upon which it can be exercised, viz: persons and estates."

State v. Express Co., 60 N. H. 241.

It is not uncommon to find a grant in indefinite general terms, limited and explained by a subsequent enumeration of particulars; and when such enumeration is clearly and explicitly made, it must be construed to control the general terms, for otherwise it will be merely idle and nugatory. *Opinion of Justices,* 4 N. H. 565.

In a constitution, the great purpose of which is to define and limit the powers of government, it cannot be supposed that the power to levy and assess taxes would be granted to the legislature without any obligatory restraint on its exercise. No power is capable of greater abuse, or can be

made more oppressive and odious in practice. Of this the framers of the constitution and their contemporaries have had abundant experience and knowledge. Nor can we doubt that by the use of words in the constitution the natural import of which is to put a limit on the exercise of this power, they intended them to have that operation and meaning.

Oliver v. Washington Mills, 11 Allen, 268.
Taylor v. Chandler, 56 Tenn. 366.
City of Zanesville v. Auditor, 5 Oh. St. 593.
Fletcher v. Oliver, 25 Ark. 289.
C. & O. R. R. Co. v. Miller, 19 W. Va. 408.
Hogg v. Mackay, 31 Pac. 780.
Northwestern University v. People, 99 U. S. 309.

XI.

The act of 1895 is amendatory of the several acts under which the railroad companies in question claim exemptions, within the meaning of the amendment of 1871.

The objection urged to the form of the act of 1895 is evidently based upon a misconception of the nature of the amendment.

Any law which in its necessary operation modifies or changes the legal effect of the several acts in question, amends them. The act of 1895 removes from their operation the granted lands, and hence is *pro tanto* amendatory in its character within the

meaning of the constitutional amendment. There is no restriction in the amendment as to the manner in which the legislature was to act upon the subject. The only limitation which is imposed upon the legislature is that whatever law is passed shall, before becoming effective, be ratified by a popular vote.

XII.

Authority to prescribe a form of taxation appropriate to a given business, like a per centum tax upon the gross earnings of a railroad company, does not imply authority to contract away the right of taxation, wholly or in part.

The infirmity of the argument of the plaintiff in error consists in assuming, *first,* the existence of a legislative authority to contract, and, *second,* that the gross earnings method was intended to be a contract, both of which propositions are denied by the defendant in error. Conceding for the purposes of argument only, that under the Minnesota constitution a gross earnings method of taxation is permissible, we contend that, save for the effect of the constitutional amendment of 1871, the legislature is at liberty to change the rate at any time, as justice may require ,or to wholly abrogate the method whenever, in its judgment, it shall be deemed advisable. The method adopted does not rest in contract, but springs from legislative power, and may be withdrawn.

Tucker v. Ferguson, 22 Wall. 528.
West Wis. Ry. Co. v. Brd of Supervisors, 93 U. S. 595.
Pennsylvania College Cases, 13 Wall. 190.
Bailey v. Maguire, 22 Wall. 217.
Railway Co. v. Philadelphia, 101 U. S. 529.
Salt Co. v. E. Saginaw, 13 Wall. 375.
R. R. Cos. v. Gaines, 97 U. S. 697.
N. Orleans C. & L. R. Co. v. N. Orleans, 143 U. S. 192.

XIII.

Assuming that a gross earnings tax is a legitimate exercise of the taxing power, and that no contract right was acquired by virtue of the special laws in question, it follows that the question is not at all embarrassed by the fact that under the said laws the gross earnings taxes were in lieu of other taxation upon both the granted lands and other property of the railroad companies.

It was clearly within the power of the legislature to subject the granted lands to the ordinary method of taxation. Nor is it material that in the act submitted to and ratified by the people of the State effecting such a change of policy, no reduction was made or authorized in the existing rate. Whether the rate as applied to the property essential to the operation of the railroad be or be not excessive, or unjust, is not a judicial question. All such ques-

tions must be addressed to the legislature rather than to the Court.

Nathan v. Louisiana, 8 How. 82.
McCulloch v. Maryland, 4 Wheat. 419-425.
Providence Bk. v. Billings, 4 Pet. 563.
People v. Flagg, 46 N. Y. 401.
Merriwether v. Garrett, 102 U. S. 472.
Kirtland v. Hotchkiss, 100 U. S. 491.

XIV.

Under Article IX, Section 1, of the Constitution of Minnesota, prescribing a rule of equality and uniformity, the Legislature was prohibited from taxing the lands of railroad companies at a less rate, or by any other rule, than that by which similar property of owners was taxed.

The reason which justifies the adoption of a gross earnings tax as to ordinary railroad property, i. e., property which is essential to the operation of the business of a railroad company, repudiates the taxation of land acquired by grant by the same rule.

Even under laws where the property of a railroad company was deemed exempt, the courts, with marked unanimity of opinion, have held that the exemption did not extend to all property of the company regardless of the purposes for which it was held or the uses to which it was devoted.

State v. Newark, 26 N. J. L. 519.
Cooley on Taxation, 151.

County of Ramsey v. C., M. & St. P. Ry. Co., 33 Minn. 537.
County of St. Louis v. St. P. & D. R. R. Co., 45 Minn. 510.
25 *Amer. & Eng. E. of L.*, 162, note 2, citing numerous cases.

The same strictness of rule obtains against relieving any owner of a given class of property of his just proportion of the tax, even where it is held that the legislature may exempt the class.

Bright v. McCullough, 27 Ind. 223.
Dailey v. Snap, 47 Miss. 387.
Palmer v. Strump, 29 Ind. 329.
People v. Whyler, 41 Cal. 351.
Portland Bank v. Anthorp, 12 Mass. 252.
State v. Express Co., 60 N. H. 242.
City of Zanesville v. Auditor, 5 Oh. St. 593.
Loftin v. Citizen's Nat. Bank, 85 Ind. 341.

Such provisions are intended to prohibit discrimination in favor of or against persons and classes, either of persons or of property.

Lehigh Iron Co. v. Lower, 81 Pa. St. 482.
Fletcher v. Oliver, 25 Ark. 289.
Primm v. Belleville, 59 Ill. 142.
Youngblood v. Sexton, 32 Mich. 406.
People v. Weaver, 100 U. S. 539.
Ger. Nat. Bank v. Kimball, 103 U. S. 732.

Corporations fall within the purview of such provisions as well as private individuals and all other subjects of taxation.

Clark v. Mibit, 67 Ala. 217.
Ottawa Gas Light Co. v. Downey, 127 Ill. 201.
Davenport v. Chi. etc. R. Co., 38 Ia. 633.

Conformity to their requirements is an indispensible prerequisite to the validity of a tax imposed in a State when such a provision is in force.

Sleight v. People, 74 Ill. 47.
People v. Henderson, 12 Col. 369.
Northampton v. Hampshire Co., 145 Mass. 108.
State v. Cumberland, etc., R. Co., 40 Md. 22.
Wis. Cent. R. Co. v. Taylor, 52 Wis. 37.

Taxes are equal and uniform when all within the limits of the district share equal benefits therefrom, or when they are imposed uniformly upon all property or things of the same description.

Smith v. Aberdeen, 25 Miss. 458.
Palmer v. Stumph, 29 Ind. 329.
Morris v. Waco, 57 Texas 635.
Dyar v. Farmington, 70 Me. 515.

Conclusion.

To summarize the contentions urged on behalf of the defendant in error, we say:

1. That the exemptions claimed on behalf of the several railroad companies whose lands are involved in this suit, are based upon statutes enacted subsequent to the adoption of a constitution by the State in 1858.

2. That that constitution, as held by the Court below, prohibited the legislature from contracting

away, wholly or in part, the right to tax the said lands and that they could not lawfully be taxed otherwise than by the rule of uniformity therein provided.

3. That the amendment to the constitution of that State in 1871 operated as a *temporary validation* of the several statutes in question providing for a per centum method of taxation.

4. That such method of taxation was subject to change at any time when effected in the manner provided by the said amendment.

5. That the percentum method of taxation is not a contract at all, but a system of taxation which rests in and derives its force from the sovereign will as expressed in the said amendment.

6. That it necessarily follows from the foregoing postulates, that the lands in question might be brought under the general and ordinary method of taxation, without affecting, so far as this Court is concerned, the question as to the manner in which the remaining properties of the said companies should be taxed, that being a question of purely state policy, the validity of which must be determined, if at all, in other, than the present, litigation.

7. That the right of exemption must rest upon clear and express provisions of law unembarrassed by any question of doubt, and that doubt is fatal to it.

West Wis. R. Co. v. Board of Supervisors, 93 U. S. 595.

8. That the grants to the State by Congress,

whether as to swamp or other lands, were not intended to, nor did they, operate to clothe the legislature with the power to stipulate away the sovereign right of taxation as to such lands; for to concede that the power existed to exempt such lands from taxation for any time carries with it the power to so exempt them for all time. There is no halting place between the power to provide for temporary and perpetual exemption.

West Wis. R. R. Co. v. Board of Supervisors, 35 Wis. 267, citing *Washington University v. Rouse, supra.*

9. That it is, at best, a harsh doctrine that a legislature can in any case contract away the sovereign power of taxation, and it should therefore be restricted to those cases where the claim rests upon clear and unmistakable terms.

For such reasons, it is respectfully submitted, that the judgment of the State Supreme Court should be affirmed.

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